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Sent: Thursday, August 11, 2022 12:35 PM
To: O'Connor, Darcy; Garcia, Bert; Bloom, Judy; Todd, Andrew; Perkins, Erin; Volk, Everett; Wirick, Holiday
Cc: Thomas, Latosha; Jenkins, Laura Flynn; Mylott, Richard
Subject: FYSA: Mercury/Water Quality Standards: North Dakota Notice of Intent to Sue U.S. Environmental Protection Agency

August 10, 2022

Mercury/Water Quality Standards: North Dakota Notice of Intent to Sue U.S. Environmental Protection Agency

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<https://www.jdsupra.com/legalnews/mercury-water-quality-standards-north-7809494/>

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The North Dakota Attorney General (“AG”) sent a document to the United States Environmental Protection Agency (“EPA”) styled:

60-Day Notice of Intent to Sue for Failure to Perform Nondiscretionary Duty under the Clean Water Act (“NOI”)

The *NOI* alleges EPA failed to approve or disapprove, pursuant to Section 303 of the Clean Water Act, North Dakota’s revised water quality criteria (“WQC”) for mercury within the requisite time period.

WQC are ambient water quality conditions that are deemed protective of the uses established for a waterbody. States are required to adopt WQC protective of the designated uses in a water quality standard (“WQS”). The WQC must specify the maximum concentration of pollutants that may be present in the water without impairing its suitability for certain uses.

A scientific underpinning or rationale for a particular WQC is required. The WQC represent a judgment as to what levels, concentrations, or conditions can support a desired use.

WQC are developed by EPA under Section 304(d) of the Clean Water Act. They are frequently used by the states in establishing or revising their WQS. However, states are free to adopt or develop their own WQC. Once a state adopts WQC, they must be reviewed and approved by EPA.

The North Dakota AG's *NOI* states that as part of its triennial review of the state's WQS a decision was made to revise the chronic aquatic life mercury criterion. The revision is stated to have been undertaken to be consistent with EPA's current recommended chronic aquatic life mercury criterion published in 1995.

The *NOI* discusses the North Dakota Department of Environmental Quality's ("NDDEQ") process for determining what it viewed as an appropriate mercury criterion in relation to EPA's 304(a) recommended mercury criterion. Also referenced were discussions between NDDEQ and EPA's submission of public comments. The NDDEQ mercury criteria were adopted and submitted to EPA for approval.

The *NOI* takes the position that EPA had until September 13, 2020, to approve the revised WQS and until October 13, 2021, to disapprove them and provide the changes required to satisfy the Clean Water Act. Reference is made to further correspondence by NDDEQ to EPA inquiring as to the status of EPA's review.

EPA is stated to have issued a letter approving most of the North Dakota revisions on November 30, 2020. However, EPA is stated to have not taken action upon the revised mercury criterion. In addition, NDDEQ's Director is stated to have sent a letter to EPA Region 8 inquiring into the status of its review of the mercury criterion. It is further alleged EPA's failure to act is in violation of the Clean Water Act and NDDEQ requested that the federal agency either approve or disapprove the criterion. EPA is stated to have still not acted or indicated any intention to do so.

As a result, the North Dakota AG argues EPA violated its nondiscretionary duty to either approve the revised mercury criterion within 60 days after submittal or notify the state of its disapproval and provide the changes required to satisfy the Clean Water Act within 90 days.

The *NOI* indicates the North Dakota AG intends to file suit to compel EPA to comply with the law if it does not comply with its nondiscretionary duty within 60 days of the receipt of the *NOI*.

A copy of the *NOI* can be downloaded [here](#).

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